No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

R. Russell Hollenbeck
Raffi Melkonian
Counsel of Record
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, TX 77056
(713) 572-4321
melkonian@wrightclosebarger.com

QUESTION PRESENTED

Whether the defense that a Title VII plaintiff failed to exhaust administrative remedies is subject to waiver.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Factual background 2

B. Procedural background 4

REASONS FOR DENYING THE WRIT 6

I. The Fifth Circuit's decision is plainly correct 6

A. This Court's Title VII precedent dictates that the failure-to-exhaust defense is subject to waiver 8

B. General statutory interpretation principles confirm that the failure-to-exhaust defense is subject to waiver 10

II. No court of appeals would have ruled differently from the Fifth Circuit 14

III. The question presented is unimportant 19

IV. The outcome here does not hinge on whether the failure-to-exhaust defense is subject to waiver 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Agolli v. Office Depot, Inc.,
548 Fed. Appx. 871 (4th Cir. 2013) 21

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974).....9

Allen v. Highlands Hosp. Corp.,
545 F.3d 387 (6th Cir. 2008).....17, 18

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006)..... *passim*

Artis v. Bernanke,
630 F.3d 1031 (D.C. Cir. 2011).....15

B.K.B. v. Maui Police Dep't,
276 F.3d 1091 (9th Cir. 2003).....20, 22

Boos v. Runyon,
201 F.3d 178 (2d Cir. 2000) 15

Brown v. Potter,
457 Fed. Appx. 668 (9th Cir. 2011) 20

Brown v. Snow,
440 F.3d 1259 (11th Cir. 2006).....18, 21

Crawford v. Babbitt,
186 F.3d 1322 (11th Cir. 1999).....18

Davis v. N.C. Dep't of Corr.,
48 F.3d 134 (4th Cir. 1995).....16

De Medina v. Reinhardt,
686 F.2d 997 (D.C. Cir. 1982).....21

Edelman v. Lynchburg Coll.,
300 F.3d 400 (4th Cir. 2002).....15

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008).....22

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976).....9

Freytag v. Comm'r,
501 U.S. 868 (1991).....5

Gad v. Kan. State Univ.,
787 F.3d 1032 (10th Cir. 2015).....15

Garner v. G.D. Searle Pharmaceuticals Co.,
581 Fed. Appx. 782 (11th Cir. 2014) 18

Gonzalez v. Thaler,
565 U.S. 134 (2012).....7

Gordon v. Shafer Contracting Co.,
469 F.3d 1191 (8th Cir. 2006).....15

Gregory v. Ga. Dep't of Human Res.,
355 F.3d 1277 (11th Cir. 2004).....21, 23

Hamer v. Neighborhood Hous. Servs. of Chi.,
138 S. Ct. 13 (2017).....14

Henderson v. Shinseki,
562 U.S. 428 (2011).....10, 13

Hentosh v. Old Dominion Univ.,
767 F.3d 413 (4th Cir. 2014).....16

Hill v. Nicholson,
383 Fed. Appx. 503 (6th Cir. 2010) 18

Jackson v. Seaboard Coast Line R.R. Co.,
678 F.2d 992 (11th Cir. 1982).....18, 20

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008).....10

Jones v. Calvert Grp., Ltd.,
551 F.3d 297 (4th Cir. 2009).....16

Kaanapu v. Potter,
51 Fed. Appx. 244 (9th Cir. 2002) 17

Kontrick v. Ryan,
540 U.S. 443 (2004).....7

Leong v. Potter,
347 F.3d 1117 (9th Cir. 2003).....21

Lincoln v. BNSF Ry. Co.,
900 F.3d 1166 (10th Cir. 2018).....17, 19

Lopez v. Produce Exch.,
171 Fed. Appx. 11 (9th Cir. 2006) 17

Love v. Pullman Co.,
404 U.S. 522 (1972).....13

Manrique v. United States,
137 S. Ct. 1266 (2017).....7

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....9

Patchak v. Zinke,
138 S. Ct. 897 (2018).....10

Patton v. Jacobs Eng'g Grp.,
874 F.3d 437 (5th Cir. 2017).....22

Peppers v. Cobb Cty.,
835 F.3d 1289 (11th Cir. 2016).....18

Pham v. James,
630 Fed. Appx. 735 (10th Cir. 2015) 19

Price v. Sw. Bell Tel. Co.,
687 F.2d 74 (5th Cir. 1982).....20

Pueschel v. Peters,
340 Fed. Appx. 858 (4th Cir. 2009) 15

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010).....11, 12, 14

Rester v. Stephens Media, LLC,
739 F.3d 1127 (8th Cir. 2014).....15

Ruffin v. Lockheed Martin Corp.,
659 Fed. Appx. 744 (4th Cir. 2016) 16

Sommatino v. United States,
255 F.3d 704 (9th Cir. 2001).....17

Stache v. Int'l Union of Bricklayers,
852 F.2d 1231 (9th Cir. 1988).....16, 17

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998).....6, 7

Temengil v. Tr. Territory of Pac. Islands,
881 F.2d 647 (9th Cir. 1989).....16

Thomas v. Nicholson,
263 Fed. Appx. 814 (11th Cir. 2008) 18

Tillbery v. Kent Island Yacht Club, Inc.,
461 Fed. Appx. 288 (4th Cir. 2012) 21, 22

Tonkin v. Shadow Mgmt., Inc.,
605 Fed. Appx. 194 (4th Cir. 2015) 16

United States v. Cotton,
535 U.S. 625 (2002).....7

United States v. Wong,
135 S. Ct. 1625 (2015).....11, 12

Wade v. Sec'y of Army,
796 F.2d 1369 (11th Cir. 1986).....20

Whitaker v. Nash Cty.,
504 Fed. Appx. 237 (4th Cir. 2013) 16

Wilkerson v. Grinnell Corp.,
270 F.3d 1314 (11th Cir. 2001).....20

Womble v. Bhangu,
864 F.2d 1212 (5th Cir. 1989).....6

Woodford v. Ngo,
548 U.S. 81 (2006).....11

Zipes v. Trans World Airlines,
455 U.S. 385 (1982) ..... *passim*

Statutes

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 621 *et seq.* 18, 22

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (Title VII), 42 U.S.C. § 2000e *et seq.* ..... *passim*

42 U.S.C. § 2000e-5(f)(1) 8, 12

42 U.S.C. § 2000e-5(f)(3) 8, 12

42 U.S.C. § 2000e-5(g)(2)(A) 12

42 U.S.C. § 2000e-5(g)(2)(B)(ii) 12

Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. § 101 *et seq.* 11

17 U.S.C. § 411(a) 11

Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 42 U.S.C. § 1997e *et seq.* 11

42 U.S.C. § 1997e(a) 11

Regulation

29 C.F.R. § 1601.12(b) 21

Other Authority

45C American Jurisprudence 2d Job Discrimination § 2009 (2018) 20

INTRODUCTION

Respondent Lois Davis sued petitioner Fort Bend County for religious discrimination in violation of Title VII. After "five years and an entire round of appeals all the way to the Supreme Court," petitioner argued for the first time that the claim should be dismissed because respondent failed to exhaust her administrative remedies. Pet. App. 14a. The Fifth Circuit concluded that "[o]n these facts," petitioner had "forfeited its opportunity to assert this claim." *Id.* 15a.

Petitioner now challenges that holding, stressing that some courts other than the Fifth Circuit have labeled Title VII's administrative exhaustion requirement as "jurisdictional." But, as this Court has repeatedly observed, the lower courts over the years have been "less than meticulous" in their "profligate" use of that term. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006). All petitioner accomplishes here is to demonstrate as much. None of the supposedly conflicting cases petitioner cites required the courts to decide whether Title VII exhaustion is truly jurisdictional in the sense that it is not subject to waiver or other equitable exceptions.

That leaves petitioner with no credible argument for certiorari. This Court's decisions in *Arbaugh* and *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), make clear that Title VII's administrative exhaustion requirement is not jurisdictional in the proper sense of the term; instead, it is a claim-processing rule subject to equitable exceptions. Indeed, in every appellate case in which waiver or another equitable exception has actually been at issue, the courts have held—just like the Fifth Circuit here—that defendants may lose the ability to press the exhaustion requirement.

What is more, the question whether the failure-to-exhaust defense is subject to waiver rarely arises. Everyone agrees that when employers properly point out plaintiffs' failure to exhaust, courts are duty bound to dismiss the claims. Thus, the question presented arises only when plaintiffs fail to exhaust *and* employers fail to raise that defense in a timely manner. Employers are seldom so careless as to wait years to claim that a plaintiff never exhausted administrative remedies.

Finally, this case presents a poor vehicle for addressing the rules that should govern in cases where a plaintiff fails to exhaust a claim. Ms. Davis in fact exhausted her religious discrimination claim.

STATEMENT OF THE CASE

A. Factual background

Lois Davis is a "devout Christian." Record on Appeal (ROA) 313. An active member of her church, she has long attended 8:00 AM and 10:00 AM services every Sunday. *Id.* She also participates in Tuesday night Bible studies and holds "an important role" in her church's administration. *Id.*

Petitioner hired Ms. Davis in December 2007 as a Desktop Support Supervisor in its IT Department. She supervised fifteen employees. As the sole provider for her son, she was committed to "doing the best job possible" in order to "get [her] son graduated from high school, and off to college." ROA 645.

Soon after Ms. Davis started her new job, the Director of the IT Department, Charles Cook, began subjecting her to "constant sexual harassment and assaults." Pet. App. 17a n.2. She filed a complaint with Fort Bend County's Human Resources office and was

placed on paid leave during the pendency of the investigation. The investigation substantiated her allegations. Mr. Cook resigned, and Ms. Davis got back to work. *Id.*

After she returned from paid leave, Ms. Davis's direct supervisor, Kenneth Ford, retaliated against her in a variety of ways. A close friend of Mr. Cook, Mr. Ford reduced Ms. Davis's number of "direct reports from fifteen to four," "removed [her] from projects she previously managed," "superseded her authority" by assigning tasks directly to her subordinates, and "removed her administrative rights" to the server. Pet. App. 17a n.2.

In response, Ms. Davis filled out an intake questionnaire and filed a charge with the Texas Workforce Commission (TWC) alleging retaliation and discrimination on the basis of sex. Pet. App. 19a. Because the TWC has a work-sharing agreement with the EEOC, the state agency processes employment grievances brought under Title VII and other federal laws. *Id.*

While her complaint was pending, petitioner instructed Ms. Davis to help install computers and other hardware in the newly built Fort Bend County Justice Center. Pet. App. 18a n.2. Petitioner scheduled the installation for the weekend of July 2-4, 2011. Ms. Davis advised petitioner that she needed to attend a "special church service" that Sunday. *Id.* To make up for her absence, Ms. Davis arranged for a replacement to carry out her responsibilities—something she had done in the past. *Id.* And she made clear to Mr. Ford that she was "more than willing" to resume working on the project as soon as her church service ended. *Id.*

But Mr. Ford would not accommodate her religious observance. Indeed, he notified her that attending the service would be "grounds for a write-up or termination." Pet. App. 18a n.2.

On Sunday, Ms. Davis nevertheless went to church. She was "immediately terminated." Pet. App. 19a. Yet no similar fate befell a coworker who took time off that weekend to attend a parade. *Id.*

After her firing, Ms. Davis returned to the TWC. She amended her intake form to include "Religion" as one of the "Employment Harms" she suffered. Pet. App. 20a. She also added two new complaints to that section of the form: "Discharge" and "Reasonable Accommodation." *Id.*

A few months later, the TWC issued a letter advising Ms. Davis it had completed a "careful review" of her claims, including her allegation that she was fired after attending to "Church commitments." ROA 658-59. The TWC explained that barring new developments, it would dismiss her claims.

Shortly thereafter, the TWC dismissed the claims and issued Ms. Davis a right-to-sue letter. Pet. App. 21a. The federal government followed with a right-to-sue letter of its own. *Id.*

B. Procedural background

1. Ms. Davis filed suit against petitioner under Title VII, alleging religious discrimination, sex-based discrimination, and retaliation. The district court initially granted petitioner summary judgment on all of these claims. But the Fifth Circuit reversed and remanded. After examining the record, it found "genuine disputes of material fact" over whether "(1) Davis held a bona fide religious belief that she needed

to attend the Sunday service; and (2) Fort Bend would have suffered an undue hardship in accommodating Davis's religious observance." Pet. App. 3a. This Court denied petitioner's request for certiorari. 135 S. Ct. 2804 (2015).

The case then returned to the district court. It was at this point—five years after the start of litigation—that petitioner changed tack: It argued, for the first time, that Ms. Davis is barred from claiming religious discrimination because she did not exhaust her administrative remedies on that claim. In response, Ms. Davis maintained that petitioner waived its exhaustion defense by failing to raise it in a timely manner.[1] Pet. App. 4a. She argued in the alternative that she had satisfied the exhaustion requirement. *Id.*

The district court sided with petitioner and dismissed Ms. Davis's claim. *See* Pet. App. 37a. It held that Ms. Davis's waiver argument was "irrelevant" because the administrative exhaustion requirement is "jurisdictional." *Id.* 27a & n.7. It also concluded that Ms. Davis had not properly exhausted her religious discrimination claim. *Id.* 37a.

2. The Fifth Circuit unanimously reversed. It began by noting that the term "jurisdiction" has often been used imprecisely. Pet. App. 5a-6a. Cutting through this imprecision, the panel held that the administrative exhaustion requirement in Title VII is

---

[1] In keeping with the petition for certiorari, this brief refers to failing to raise the exhaustion defense in a timely manner as "waiver." Though such conduct might more accurately be characterized as "forfeiture," the distinction is irrelevant here. Anyhow, this Court has often used these terms "interchangeably." *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment).

a claim-processing rule—and thus subject to waiver—rather than a true jurisdictional prerequisite. *Id.* 14a.

The Fifth Circuit grounded this holding in precedent. Prior Fifth Circuit cases had relied on this Court's holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), to conclude that no aspect of Title VII's exhaustion requirement implicates courts' subject matter jurisdiction. Pet. App. 8a (citing *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989)). Reaching a contrary conclusion now, the court of appeals explained, would be "out-of-step" with this Court's later Title VII decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Pet. App. 11a. In *Arbaugh*, this Court held that a statutory requirement is jurisdictional only if the statute "clearly states" as much. 546 U.S. at 515. Applying this rule, the court of appeals observed that "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." Pet. App. 10a.

Turning to the facts, the court of appeals found it "abundantly clear" that petitioner had "forfeited" its opportunity to raise the administrative exhaustion defense. Pet. App. 15a. In light of that holding, the Fifth Circuit determined it "need not address" whether Ms. Davis actually "exhaust[ed] her administrative remedies." *Id.* 15a n.5.

3. Petitioner again seeks certiorari.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's decision is plainly correct.

This Court has repeatedly noted that "jurisdiction" is "a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)

(quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). Over the years, courts have improperly used the term "jurisdictional" in relation to an "ingredient[] of a federal claim" or something else that a plaintiff must establish to prevail. *Id.* at 503. But that "elastic concept of jurisdiction is not what the term 'jurisdiction' means today." *United States v. Cotton*, 535 U.S. 625, 630 (2002). In its proper usage, jurisdiction means "a court's power to hear a case." *Id.*

The "distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not," is significant. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). If a requirement is "truly jurisdictional," a court is obliged to dismiss a case regardless of when and how failure to satisfy the requirement comes to the court's attention. *Id.* If the requirement is not jurisdictional, it is "subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). That is, "[u]nlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point." *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (internal quotation marks omitted).

Petitioner concedes that it did not raise its failure-to-exhaust defense in a timely manner. Pet. 3, 24. The only question, therefore, is whether the defense is subject to waiver. This Court's precedent—as well as general principles governing the distinction between jurisdictional and claim-processing rules—makes clear that it is.

A. This Court's Title VII precedent dictates that the failure-to-exhaust defense is subject to waiver.

1. This Court has already decided two cases involving prerequisites for bringing a Title VII suit: *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Those cases demonstrate that the statute's mandate to exhaust administrative remedies is not a jurisdictional requirement.

In *Zipes*, this Court held that the requirement of timely filing with the EEOC is a claim-processing rule subject to waiver. 455 U.S. at 393. Petitioner tries to cabin *Zipes* to Title VII's time allotment for initiating the administrative process. Pet. 22. But the reasoning in *Zipes* extends to the statute's exhaustion requirement more generally. The Court explained that "the provision specifying the time for filing charges with the EEOC . . . does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394. The provision is also "entirely separate" from the one granting district courts jurisdiction: 42 U.S.C. § 2000e-5(f)(3). *Id.*

Both of these points apply equally here. Title VII's provisions establishing the administrative exhaustion requirement "say[] nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case." Pet. App. 10a. Rather, the provision petitioner cites merely outlines circumstances when the "aggrieved" party "may" bring a "civil action." 42 U.S.C. § 2000e-5(f)(1). Furthermore, the provision petitioner cites is separate from Title VII's actual jurisdictional provision, which appears two subsections away in Section 2000e-5(f)(3). And

that jurisdictional provision makes no mention whatsoever of administrative exhaustion.

Zipes's reliance on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), confirms that its ruling applies to Title VII's administrative exhaustion requirement as a whole. In *Franks*, the lower courts denied relief for Title VII plaintiffs on the ground that those individuals "had not filed administrative charges" at all. *Zipes*, 455 U.S. at 396. Yet this Court held that the plaintiffs' claims could go forward. As *Zipes* recognized, this decision (and Congress's acquiescence in it) establishes that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.*

Arbaugh reinforces that the logic in *Zipes* extends beyond Title VII's administrative filing period. In *Arbaugh*, the Court held the employee numerosity requirement in Title VII is subject to waiver by the defendant. 546 U.S. at 516. As in *Zipes*, the Court stressed that Title VII has an actual "jurisdictional provision" and that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms.'" *Id.* (quoting *Zipes*, 455 U.S. at 394). The same reasoning compels the conclusion that the failure-to-exhaust defense may be waived.

2. None of the case law petitioner references is to the contrary. Citing two cases from the 1970s, petitioner first maintains this Court has "long interpreted" Title VII's exhaustion requirement as "jurisdictional." Pet. 20-21 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)). But this Court explained in *Zipes* that neither of those cases

carries any precedential weight with respect to the question at hand here. Although both labeled the exhaustion requirement "jurisdictional," "the legal character of the requirement was not at issue" in either case. *Zipes*, 455 U.S. at 395; *see also id.* at 393 & n.6; *Arbaugh*, 546 U.S. at 511.

Petitioner also quotes language from *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008), and *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018). Pet. 20-21. But neither case has anything to do with Title VII or administrative exhaustion. *John R. Sand* concerned a special statute of limitations in the Court of Federal Claims governing a mining lease claim. *Patchak* involved a statute prohibiting lawsuits regarding land used for Indian gaming.

B. General statutory interpretation principles confirm that the failure-to-exhaust defense is subject to waiver.

The text, structure, and design of Title VII's administrative exhaustion provisions confirm that the requirement is subject to equitable exceptions.

1. In its 2006 *Arbaugh* decision, this Court adopted a plain statement rule: Only where Congress has "clearly state[d]" that a requirement is jurisdictional are waiver and other estoppel arguments foreclosed. 546 U.S. at 515-16. This rule reflects the burdens and "waste of judicial resources" that can arise when a statutory requirement is classified as jurisdictional—namely, that judges are forced to (a) inquire sua sponte into whether the requirement has been satisfied and (b) dismiss cases sometimes years after they have commenced. *Id.* at 504 (internal quotation marks omitted); *see also Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)

(observing that the "consequences that attach to the jurisdictional label" are "drastic"). Only if Congress has expressly signaled its acceptance of these consequences should courts absorb them.

This Court has repeatedly reaffirmed this "clear statement" rule, confirming that statutory requirements are not jurisdictional unless "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015). Congress need not use "magic words." *Id.* But to preclude the application of waiver or other equitable doctrines, Congress must expressly label a provision "jurisdictional" or otherwise make clear it affects the power of a court. *Id.*

Consequently, petitioner is wrong that statutes setting conditions that must be satisfied before "an action may be brought" are jurisdictional. Pet. 20 (internal quotation marks omitted). For instance, the Copyright Act provides that "*[n]o civil action* for the infringement of the copyright in any United States work *shall be instituted* until preregistration or registration of the copyright claim has been made." 17 U.S.C. § 411(a) (emphasis added). In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), this Court found this requirement nonjurisdictional. Similarly, the Prison Litigation Reform Act provides that "*[n]o action shall be brought* with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court held this requirement "is not jurisdictional." *Id.* at 101; *see also Muchnick*, 559 U.S. at 166 n.6 (reiterating this holding). In short, a litigant seeking to establish a statutory requirement as

jurisdictional "must clear a high bar": It must point to express language that not only sets forth a precondition to suit, but that prohibits courts from adjudicating claims absent satisfaction of that precondition. *Wong*, 135 S. Ct. at 1632.

Petitioner cannot make any such showing here. It quotes Section 2000e-5(f)(1), which provides that "a civil action *may be brought* against the respondent named in the [administrative] charge." 42 U.S.C. § 2000e-5(f)(1) (emphasis added); *see also* Pet. 20. But this provision merely dictates when an aggrieved party "may" bring a lawsuit. It makes no mention of when such person *cannot* bring a lawsuit, much less when courts lack the power to hear Title VII claims.

2. The structure of Title VII confirms that exhaustion is not a jurisdictional requirement. In *Muchnick*, this Court deemed a requirement nonjurisdictional in part because it was "not located in a jurisdiction-granting provision" of the statute. 559 U.S. at 166. So too here. Title VII's standalone jurisdictional section is Section 2000e-5(f)(3). The administrative exhaustion requirement resides elsewhere. *See supra* at 8.

Other provisions of Title VII underscore that where Congress wanted to proscribe certain judicial actions, it knew how to do so unambiguously. For instance, Section 2000e-5(g)(2)(A) provides that "[n]o order of the court shall require" that employers rehire or promote individuals under specified circumstances. And Section 2000e-5(g)(2)(B)(ii) provides that where employers make a certain showing, courts "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment." Even though these provisions do not set jurisdictional limits, they show that Congress

expressly contemplated when to restrict courts' ability to process Title VII claims—and it chose not to deny courts the power to adjudicate those claims absent administrative exhaustion.

3. As Justice Alito recently explained for a unanimous Court, the presumption against foreclosing waiver arguments is especially strong in statutory regimes that are "unusually protective" of claimants. *Henderson*, 562 U.S. at 437 (internal quotation marks omitted). Title VII is such a regime. "[L]aymen, unassisted by trained lawyers, initiate the [Title VII] process." *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). Deeming Title VII's exhaustion requirement jurisdictional would thus be "particularly inappropriate." *Id.* (quoting *Love*, 404 U.S. at 527). It is far better to incentivize defendants to raise exhaustion promptly, so that, if necessary, plaintiffs can amend administrative filings.

Petitioner objects that if the exhaustion requirement is nonjurisdictional, then plaintiffs will "bring their claims directly to court, flooding the federal courts with additional employment litigation." Pet. 23. But this contention ignores the narrow basis for the Fifth Circuit's holding. No one disputes that plaintiffs' claims must be dismissed when defendants raise a meritorious exhaustion defense in a timely manner. That being so, it would be foolhardy for Title VII plaintiffs to gamble on defendants failing to properly raise the failure-to-exhaust defense. After all, employers tend to be sophisticated institutional actors and seldom let procedural errors slide.

II. No court of appeals would have ruled differently from the Fifth Circuit.

Despite this Court's recent efforts to ensure proper use of the term "jurisdictional," lower courts still sometimes mislabel "claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)). In other words, lower courts still often state they are "dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted).

Accordingly, it is immaterial whether petitioner can point to court of appeals decisions that simply refer to Title VII's exhaustion requirement as "jurisdictional." Such "drive-by" characterizations "should be accorded no precedential effect" on the real question here: whether the failure-to-exhaust defense can be waived. *Arbaugh*, 546 U.S. at 511 (internal quotation marks omitted). Once the question presented is sharpened in this manner, it becomes clear that there is no circuit split, for no court of appeals holds that the failure-to-exhaust defense cannot be waived.

1. Petitioner acknowledges that "eight circuits" have held that the failure-to-exhaust defense is subject to waiver. Pet. 14. In fact, several Justices on this Court have helped steer the courts of appeals toward

this consensus. Then-Judges Sotomayor and Kavanaugh joined opinions reaching the same conclusion the Fifth Circuit reached here. *See Boos v. Runyon*, 201 F.3d 178, 181-82 (2d Cir. 2000); *Artis v. Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011). Then-Judge Gorsuch likewise joined an opinion strongly suggesting the same position. *See Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035-40 (10th Cir. 2015).[2]

2. Petitioner contends that the Fourth, Ninth, and Eleventh Circuits take a contrary view. But these courts, too, have issued decisions recognizing that the failure-to-exhaust defense may be waived. Arguing that other cases from these courts point in the opposite direction, petitioner appears to have fallen prey to the very trap this Court has repeatedly cautioned against: reading passing characterizations of statutory requirements as "jurisdictional" to establish precedent on whether they are subject to waiver.

a. The Fourth Circuit has recognized that Title VII's exhaustion requirement is "subject to waiver, estoppel, and equitable tolling." *Edelman v. Lynchburg Coll.*, 300 F.3d 400, 404 (4th Cir. 2002) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). Accordingly, when the employer in *Pueschel v. Peters*, 340 Fed. Appx. 858 (4th Cir. 2009), first raised administrative exhaustion after multiple appeals, the Fourth Circuit held "[w]hatever the

---

[2] Petitioner claims that the Eighth Circuit "has yet to pick a side." Pet. 15. But in its only post-*Arbaugh* cases on the issue, that court correctly recognized that a plaintiff's "fail[ure] to exhaust her administrative remedies . . . does not impact our jurisdiction." *Rester v. Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014); *see also Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194 (8th Cir. 2006).

merits of the [defendant's] exhaustion argument," it was "waived." *Id.* at 861.

Petitioner cites various Fourth Circuit cases calling the exhaustion requirement "jurisdictional." But none of these cases concerned whether the defense was subject to any equitable exception. In *Davis v. North Carolina Department of Correction*, 48 F.3d 134 (4th Cir. 1995), the Fourth Circuit ordered the district court to dismiss the plaintiff's Title VII claims for failure to exhaust. But the plaintiff offered no reason to excuse that failure, so the court had no occasion to address whether equitable "exceptions" like waiver exist. *Id.* at 140 n.4. The other cases petitioner cites fit the same mold. *See Ruffin v. Lockheed Martin Corp.*, 659 Fed. Appx. 744, 745 n.1, 746-47 (4th Cir. 2016); *Tonkin v. Shadow Mgmt., Inc.*, 605 Fed. Appx. 194, 194-95 (4th Cir. 2015); *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 415-17 (4th Cir. 2014); *Whitaker v. Nash Cty.*, 504 Fed. Appx. 237, 240 (4th Cir. 2013); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 299-301 (4th Cir. 2009). In *Hentosh*, moreover, the plaintiff *had* exhausted her claim. 767 F.3d at 417.

b. The Ninth Circuit takes the same approach: A Title VII defendant "may waive or be estopped from asserting" that the plaintiff did not exhaust administrative remedies prior to filing a Title VII claim. *Stache v. Int'l Union of Bricklayers*, 852 F.2d 1231, 1233 (9th Cir. 1988). Thus, where "equitable conditions" demand it, the Ninth Circuit has long held that courts have the discretion to "excuse" failure to exhaust. *Temengil v. Tr. Territory of Pac. Islands*, 881 F.2d 647, 654 (9th Cir. 1989).

Petitioner contends that in *Sommatino v. United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit

changed course and held that the exhaustion requirement is not subject to waiver. Pet. 11-12. But far from abrogating *Stache*, *Sommatino* reaffirmed that "the administrative exhaustion requirements under Title VII are not jurisdictional but are conditions precedent to filing an action which a defendant may waive or be estopped from asserting." 255 F.3d at 708 (citing *Stache*, 852 F.2d at 1233). Accordingly, the Ninth Circuit continues to apply equitable principles to debates involving the failure-to-exhaust defense. *See, e.g.*, *Lopez v. Produce Exch.*, 171 Fed. Appx. 11, 14 (9th Cir. 2006); *Kaanapu v. Potter*, 51 Fed. Appx. 244, 247 (9th Cir. 2002).

Petitioner nevertheless fastens on language in *Sommatino* holding that Title VII's requirement to "present[]" a discrimination complaint to "an appropriate administrative agency" is jurisdictional. Pet. 11 (quoting 255 F.3d at 708). So, under *Sommatino*, "equitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made." 255 F.3d at 710.

But because Ms. Davis filed a charge with the appropriate agency, *see* Pet. App. 19a-20a, that restriction on equitable remedies would not apply here. In any event, it is doubtful *Sommatino*'s limited restriction on equitable exceptions remains good law. That decision predated *Arbaugh*'s adoption of the "clear statement" rule. After the announcement of that rule, two circuits reconsidered and abrogated prior law treating Title VII's administrative exhaustion requirement as jurisdictional. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1184 (10th Cir. 2018) (abrogating precedent in part because "*Arbaugh* supports [the] position that exhaustion is not jurisdictional"); *Allen v. Highlands Hosp. Corp.*,

545 F.3d 387, 400 (6th Cir. 2008) (holding that any "assertion that the exhaustion requirement is a jurisdictional prerequisite is no longer accurate in light of the Supreme Court's decision in *Arbaugh*").[3] If presented with the question today, the Ninth Circuit would likely do the same.

c. The Eleventh Circuit agrees the failure-to-exhaust defense is waivable. In *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir. 1982), plaintiffs failed to exhaust administrative remedies, but the Eleventh Circuit ruled that the defendant waived its opportunity to dispute exhaustion by failing to raise the issue until after trial. *Id.* at 1009-11.

Petitioner asserts that *Crawford v. Babbitt*, 186 F.3d 1322 (11th Cir. 1999), abrogated *Jackson*. Pet. 13. But the plaintiff in *Crawford* never advanced—and the Eleventh Circuit never considered—any equitable argument. 186 F.3d at 1327. Nor did any of the other cases petitioner cites raise a question concerning waiver. In *Thomas v. Nicholson*, 263 Fed. Appx. 814 (11th Cir. 2008), the plaintiff pressed no equitable argument. *Id.* at 815 n.1. And in *Peppers v. Cobb County*, 835 F.3d 1289, 1297 (11th Cir. 2016), and *Brown v. Snow*, 440 F.3d 1259, 1264-65 (11th Cir. 2006), the Eleventh Circuit held the plaintiffs had successfully exhausted.

Accordingly, *Jackson* remains binding precedent in the Eleventh Circuit. In *Garner v. G.D. Searle Pharmaceuticals Co.*, 581 Fed. Appx. 782 (11th Cir. 2014), for example, the plaintiff alleged multiple types

---

[3] *Allen* decided the issue in the context of the ADEA. 545 F.3d at 401. In *Hill v. Nicholson*, 383 Fed. Appx. 503 (6th Cir. 2010), the Sixth Circuit extended *Allen* to Title VII. *Id.* at 508.

of discrimination under Title VII—but had exhausted only some of those claims with the EEOC. *Id.* at 783-84. Nevertheless, the Eleventh Circuit held the defendant "waived its exhaustion defense by failing to include it in the pretrial order." *Id.* at 784.

3. Finally, petitioner is wrong that the Executive Branch is divided on the question presented. The EEOC takes the position that the Fifth Circuit adopted below. This position is longstanding, extensively considered, and well-explained. *See, e.g.*, Brief of EEOC as Amicus Curiae at 8-13, *Lincoln*, 900 F.3d 1166 (No. 17-3120), 2017 WL 4349417.

Petitioner asserts that the Department of Justice has taken the opposite view. But the language that petitioner plucks from a few briefs simply labels the exhaustion requirement as "jurisdictional"; none of the arguments in those appeals turned on whether the requirement could be waived. Pet. 18-19.

III. The question presented is unimportant.

The question whether employers can waive the defense that a Title VII plaintiff failed to exhaust arises only where (1) the defendant fails to raise the defense in a timely manner and (2) a plaintiff has actually failed to satisfy Title VII's administrative exhaustion requirement. Neither of these conditions occurs with frequency.

1. "Whether the exhaustion requirement is characterized as jurisdictional is important only when the defendant has waived or forfeited the issue." *Pham v. James*, 630 Fed. Appx. 735, 738 (10th Cir. 2015) (internal quotation marks omitted). Given the general competence of employers (and their lawyers), that seldom happens. Indeed, of the eighteen cases

that petitioner cites from supposedly adverse circuits, waiver was at issue in only one. *See Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1003 (11th Cir. 1982).

2. At any rate, courts rarely find that plaintiffs failed to exhaust their administrative remedies. *See generally* 45C Am. Jur. 2d Job Discrimination § 2009 (2018).

a. To exhaust a Title VII claim, a plaintiff need not perfectly comply with all of the statute's requirements. Instead, all exhaustion requires is a "[g]ood faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information." *Wade v. Sec'y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986).

For instance, "meeting with an [Equal Employment Opportunity] counselor to resolve a dispute" can suffice. *Brown v. Potter*, 457 Fed. Appx. 668, 672 n.3 (9th Cir. 2011). Similarly, referencing claims on written submissions besides a formal charge document can satisfy the exhaustion requirement. For instance, in *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir. 2003), the plaintiff failed to raise a sexual harassment claim in her formal charge, but the court accepted allegations of sexual harassment raised in her "pre-complaint questionnaire" as "evidence that her claim for relief was properly exhausted." *Id.* at 1102; *see also Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001) (intake form sufficient); *Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982) (unofficial charge that was "neither signed nor sworn" could be sufficient).

Similarly, once plaintiffs have filed charges, they may "clarify and amplify allegations" made in the

original charge and add "additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Such amendments need not be in writing or verified. *See, e.g., Agolli v. Office Depot, Inc.*, 548 Fed. Appx. 871, 875 (4th Cir. 2013) (raising new allegations via "continuation sheets" filed after charge).

b. Courts also find plaintiffs to have exhausted any claim "reasonably related" to charges they brought before the EEOC. *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003). For example, in *Gregory v. Georgia Department of Human Resources*, 355 F.3d 1277 (11th Cir. 2004), the plaintiff raised only race and gender-discrimination claims before the EEOC. But she was deemed to have exhausted a retaliation claim too, because the EEOC's investigation of her race and gender claims would have "reasonably uncovered any evidence of retaliation." *Id.* at 1280.

Indeed, a plaintiff who never brought *any* claims before the EEOC can be deemed to have exhausted a claim if it is "reasonably related" to one a different plaintiff exhausted. For example, in *De Medina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982), the plaintiff's "claim was so similar to that made by [her colleague] who had filed an EEOC charge" that the court found that "the purposes of the exhaustion requirement had been served" by the colleague's filing. *Id.* at 1012-13.

c. Finally, courts find the exhaustion requirement is satisfied when an employee's efforts were "hampered by the action of the agency." *Brown v. Snow*, 440 F.3d 1259, 1264 (11th Cir. 2006) (internal quotation marks omitted); *see also Tillbery v. Kent*

Island Yacht Club, Inc., 461 Fed. Appx. 288, 297 (4th Cir. 2012). If, for instance, the plaintiff's theory of the case is not properly recorded due to "negligence of any representative," the plaintiff will be found to have exhausted. *B.K.B.*, 276 F.3d at 1102.

IV. The outcome here does not hinge on whether the failure-to-exhaust defense is subject to waiver.

Even if this Court were to adopt petitioner's proposed rule, the result of this appeal would remain the same. Petitioner argues "[t]here is no serious question that Davis failed to present her religious-discrimination claim to the EEOC." Pet. 23. But the Fifth Circuit expressly left open the possibility that "she did exhaust her administrative remedies." Pet. App. 15a n.5. And for two independent reasons, the Fifth Circuit would likely hold—if forced to reach the issue—that Ms. Davis satisfied Title VII's exhaustion requirement.

1. Ms. Davis sufficiently presented her religious discrimination claim to the relevant administrative agencies. As noted above, material on an "intake questionnaire" or submitted through an amended form can be "considered *part* of the formal charge." *Patton v. Jacobs Eng'g Grp.*, 874 F.3d 437, 443 (5th Cir. 2017); *see also supra* at 20-21. And this Court has held the same in the ADEA context. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 404-06 (2008) (deciding that an EEOC "intake questionnaire" could be "deemed a charge" because it was "reasonably . . . construed to request agency action and appropriate relief on the employee's behalf").

Under this rubric, Ms. Davis exhausted her religious discrimination claim. After filing her initial charges with the TWC, she amended her intake form

to allege that petitioner failed to accommodate her "Religion." ROA 641. That amendment sufficiently presented her religion-based claim to the agency.

2. Even if Ms. Davis did not sufficiently present her religious discrimination claim to the agency, it is still exhausted because it is "reasonably related" to her other claims. A reasonable relation exists where an EEOC investigation of the exhausted claims would have "reasonably uncovered any evidence of" the claims now raised in court. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004); *see also supra* at 21.

Such is the case here. The TWC's investigation of Ms. Davis's claims—which it continued to pursue after she notified the agency that she had suffered employment harms on the basis of her "[r]eligion"—actually *did* uncover evidence of the events forming the basis of her religious discrimination claim. *See* ROA 653, 659. In fact, petitioner explicitly told the TWC that it terminated Ms. Davis after she missed work for "Church commitments." *Id.*

In short, the question presented is not dispositive here. If this Court ever finds it necessary to consider whether Title VII defendants can waive the failure-to-exhaust defense, it should at least wait for a case in which that question actually matters to the outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

R. Russell Hollenbeck
Raffi Melkonian
Counsel of Record
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, TX 77056
(713) 572-4321
melkonian@wrightclosebarger.com

December 19, 2018